

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 1249

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House Environmental Resources
and Energy Committee

North Office Building
Hearing Room No. 1
Harrisburg, Pennsylvania

Tuesday, September 27, 2005 - 9:00 a.m.

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BEFORE:

Honorable William Adolph, Majority Chairperson
Honorable Martin Causer
Honorable Jacqueline Crahalla
Honorable Thomas Creighton
Honorable Kate Harper
Honorable Scott Hutchinson
Honorable Ronald Miller
Honorable Jeffrey Pyle
Honorable Kathy Rapp
Honorable Dave Reed
Honorable Chris Ross
Honorable Richard Stevenson
Honorable Carole Rubley
Honorable Robert Freeman
Honorable Camille George
Honorable Dan Surra
Honorable Daylin Leach
Honorable Michael McGeehan
Honorable W. Curtis Thomas
Honorable David Levdansky
Honorable Greg Vitali
Honorable Jim Wansacz
Honorable John Yudichak

1 IN ATTENDANCE:

2 Joseph Peklinski
Majority Executive Director

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4 Mark Brown
Majority Research Analyst

5 Vicki Hoffman
Administrative Assistant

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7 Wayne Crawford
Majority Research Analyst

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1 CHAIRPERSON ADOLPH: Good morning. I'd
2 like to welcome everyone to this morning's meeting
3 of the Environmental Resources and Energy
4 Committee, which is a public hearing on House Bill
5 1249.

6 I would also like to offer a special
7 welcome and a thank you to our panel of testifiers
8 that are with us today. I know that each -- and
9 appreciate your willingness to share your
10 expertise with us and for the time you spent in
11 preparing for today.

12 House Bill 1249, sponsored by
13 Representative Carole Rubley, would establish a
14 process of creating, modifying, and enforcing what
15 are called environmental covenants.

16 These covenants are typically attached
17 to the deeds of a formerly contaminated property
18 that has been cleaned up using circumstance.

19 The covenants outlined the types of
20 physical measures which must remain in place to
21 prevent contact with any contamination that might
22 remain on the site or institutional controls such
23 as various legal measures to prevent certain uses
24 or activity on the site.

25 Maintaining the Commonwealth's ability

1 to enforce these covenants over time and through a
2 variety of owners is what this bill seeks to
3 accomplish.

4 Since this is a very complex but very
5 important subject, it seemed prudent to hold this
6 hearing to afford the Committee an opportunity to
7 understand the technical nature of the bill and to
8 ask questions.

9 I'd like the members, starting on my
10 left, to identify themselves and the district or
11 county that they represent.

12 REPRESENTATIVE CRAHALLA: Jacquie
13 Crahalla, Montgomery County.

14 REPRESENTATIVE CAUSER: Martin Causer,
15 McKean, Potter, and Cameron Counties.

16 REPRESENTATIVE RAPP: Katherine Rapp,
17 Warren, Forest, McKean County.

18 REPRESENTATIVE HARPER: Kate Harper,
19 Montgomery County.

20 REPRESENTATIVE RUBLEY: Carole Rubley,
21 parts of Chester and Montgomery Counties.

22 CHAIRPERSON ADOLPH: Bill Adolph,
23 Delaware County.

24 REPRESENTATIVE SURRA: Dan Surra from
25 Clearfield County. And on behalf of

1 Representative George -- he's in another meeting
2 and will try to get here as soon as he's complete
3 with that meeting; and he wants to say that he's
4 very interested in this issue.

5 House Bill 1249 that Representative
6 Rubley's offered, provides the establishment for
7 these covenants to deal with these long-term
8 issues and let the departments of the federal and
9 state government have some jurisdiction over them.

10 Currently under common law, the
11 restrictions often last with the transfer of
12 property and increase the problem. And
13 Representative George looks forward to the
14 testimony from Deputy Secretary DePasquale and
15 others so that we can better understand the
16 solution to this problem. Thank you.

17 CHAIRPERSON ADOLPH: Thank you,
18 Representative.

19 REPRESENTATIVE LEACH: Representative
20 Daylin, Leach, Montgomery County.

21 REPRESENTATIVE MeGEEHAN: Mike
22 McGeehan, Philadelphia.

23 REPRESENTATIVE YUDICHAK: John
24 Yudichak, Luzerne County.

25 REPRESENTATIVE STEVENSON: Rick

1 Stevenson, Mercer and Butler County.

2 REPRESENTATIVE REED: Dave Reed,

3 Indiana County.

4 REPRESENTATIVE HUTCHINSON: Scott

5 Hutchinson, Venango County.

6 REPRESENTATIVE VITALI: Greg Vitali,

7 Delaware County.

8 REPRESENTATIVE FREEMAN: Bob Freeman,

9 Northampton County.

10 REPRESENTATIVE ROSS: Chris Ross from

11 Chester County.

12 REPRESENTATIVE PYLE: Jeff Pyle from

13 Armstrong and Indiana Counties.

14 CHAIRPERSON ADOLPH: Okay. Thank you.

15 I'd like to turn the floor over to the prime

16 sponsor of House Bill 1249, Representative Carole

17 Rubley, who has been a true advocate for this

18 particular legislation.

19 REPRESENTATIVE RUBLEY: Thank you very

20 much, Mr. Chairman; and I do appreciate your

21 bringing this bill up for a hearing today.

22 House Bill 1249 is based on the Uniform

23 Environmental Covenants Act, commonly referred to

24 as UECA, developed by the National Conference of

25 Commissioners on Uniform State Laws, commonly

1 referred to as NCCUSL, after three years of
2 intensive work with input from national experts.

3 To date, at least seven states have
4 enacted UECA: Iowa, Kentucky, Maryland, Nebraska,
5 Ohio, South Dakota, and West Virginia and maybe a
6 couple others have come on line; and twelve other
7 states are considering similar bills.

8 The Uniform Environmental Covenant Bill
9 establishes requirements for future uses of
10 brownfield sites when the property is sold from
11 one owner to another. It will help to ensure that
12 land use controls imposed at the cleanup approved
13 will be reliable and enforceable throughout the
14 future.

15 Pennsylvania was a leader with the
16 enactments of Act 2, 3, and 4 -- our brownfield
17 cleanup bills -- in the mid-'90s, becoming a
18 leader nationally.

19 With over 1500 sites successfully
20 cleaned up and put to new uses, there are still
21 serious concerns over the ability of the
22 Department of Environmental Protection to enforce
23 the covenants on future uses of the sites as
24 properties pass from one owner to another.

25 In fact, DEP did a survey of sites that

1 were cleaned up and found that in approximately 25
2 percent of the cases the actual covenants were not
3 totally being enforced.

4 In order to adapt the Uniform
5 Environmental Covenants Act to Pennsylvania, we
6 assembled a work group which diligently spent
7 hours sharing their expertise to work out some
8 differences.

9 I am very indebted to the input of
10 people such as Ray Pepe from Kirkpatrick and
11 Lockhart; Terry Bossert and Pam Witmer with the
12 Pennsylvania Chemical Industry Council; DEP staff,
13 Joe Leighton and Curt Poposky; Vince DeLiberato
14 from the Legislative Reference Bureau; Eric
15 Fillman and Nora Winkelman from the Governor's
16 General Council office and also Patty Welty and
17 Joanne Denworth from the Governor's staff and to
18 our staff, Wayne Crawford, Joe Peklinski, and Mark
19 Brown.

20 As our work group struggled through
21 many difficult issues, we were able to come to an
22 agreement on most. Although we still have a
23 couple of outstanding issues, I hope that we can
24 move forward House Bill 1249 to help ensure
25 environmental protection at all of our brownfield

1 sites.

2 And thank you, Mr. Chairman, for this
3 opportunity.

4 CHAIRPERSON ADOLPH: Thank you,
5 Representative.

6 I'd like to acknowledge the presence of
7 Representative Wonzak and Representative Curtis
8 Thomas. I'd like to remind the members that we'll
9 conduct a question-and-answer period after
10 everyone has testified.

11 I'd like to start out today with our
12 first testifier, Mr. Ray Pepe. Ray is an attorney
13 with the law firm of Kirkpatrick and Lockhart
14 Nicholson and Grant and is here today representing
15 the National Conference of Commissioners on
16 Uniform State Laws.

17 Good morning, Ray.

18 MR. PEPE: Good morning.

19 As Representative Rubley has indicated,
20 House Bill 1249 does recommend the enactment in
21 Pennsylvania of the Uniform Environmental
22 Covenants Act drafted and promulgated by the
23 National Conference of Commissioners on Uniform
24 State Laws.

25 As a 20-year member of the conference

1 and a Pennsylvania delegate to the conference, I
2 appreciate the opportunity to appear before you
3 today and to talk briefly about this act.

4 What I'd like to address in my comments
5 to the Committee is a brief explanation of the
6 National Conference, its roles and its activities,
7 how the Uniform Environmental Covenants Act in
8 particular was drafted by the National Conference.

9 I'd like to highlight the principal
10 goals and objectives of the Act, explain briefly
11 how it was modified to conform to unique
12 Pennsylvania legal and administrative
13 requirements, and then to comment on the materials
14 that are available to assist this Committee in its
15 deliberations with respect to the Act.

16 To begin with, the National Conference
17 of Commissioners and Uniform State Laws is a
18 organization created by all 50 states plus the
19 District of Columbia, the Virgin Islands, and
20 Puerto Rico, that's been in existence since 1890
21 and is charged with the obligation of developing
22 recommendations for considerations by state
23 legislators in areas where increased and improved
24 uniformity among the laws would be beneficial.

25 It's an organization that's committed

1 to the objective that federalism requires
2 recognition of the role of states and the makings
3 of the sovereignty and the dependence of states
4 rather than the preemption of state law by
5 Congress and the belief that we can often
6 accomplish more working cooperatively together, as
7 states, than can be accomplished through allowing
8 various important bodies of law that traditionally
9 have been the province of states to be taken over
10 by a uniform set of federal enactments.

11 The National Conference consists of
12 gubernatorial and legislative appointees from all
13 50 states. All of the members are attorneys.

14 Approximately two-thirds of the
15 conference is divided evenly between private
16 practitioners like myself, many of whom have had
17 substantial years of government service, and a
18 substantial delegation of law school academics who
19 are interested in these topics.

20 The remaining one-third of the members
21 of the Conference consist in about equal parts of
22 state and federal judges and legislators from a
23 variety of states.

24 The Pennsylvania
25 Conference -- delegation of the National

1 Conference consists of eight members: Three
2 gubernatorial appointees and four legislative
3 appointees, one from each legislative caucus.
4 The Governor's General Council serves as the
5 Chairman of the Pennsylvania delegation to the
6 National Conference.

7 The Uniform Environmental Covenants Act
8 was drafted in the standard procedure that the
9 National Conference uses to develop uniform state
10 legislation.

11 It started with a recommendation to the
12 Scope and Program Committee of the Conference to
13 appoint a study committee to determine whether or
14 not it was worthwhile to develop the Uniform Act.

15 A recommendation was made to the Scope
16 and Program Committee at the National Conference
17 by the American College of Real Estate Lawyers,
18 the Real Property Probate and Trust section of the
19 American Bar Association, and the American College
20 of Mortgage Attorneys, as well as the Community
21 Association's Institute.

22 Based on those recommendations, the
23 Conference appointed a study committee which met
24 with approximately 35 major stakeholder groups
25 from around the country to determine whether or

1 not it would be worthwhile to try to develop a
2 uniform law in this area.

3 The unanimous recommendation of all 35
4 stakeholders was this was a topic that deserved
5 uniform legislation and the Study Committee
6 provided a strong recommendation that the
7 Conference proceed.

8 Based on the Study Committee
9 recommendations, the Executive Committee of the
10 National Committee appointed a drafting committee
11 to develop the act.

12 Drafting Committee is appointed from
13 among the members of the Conference; and then the
14 Drafting Committee is required, much the way this
15 Committee does, to draft and develop the act.

16 In this case, the Drafting Committee
17 met three times -- or three days each session and
18 then, between those meetings, circulated numerous
19 drafts over a two-year process.

20 All of the meetings of the Drafting
21 Committee were open to the public, the drafts were
22 widely circulated, and there were about
23 representatives from approximately 20 stakeholder
24 groups publicly participating in the deliberation
25 of the Drafting Committee.

1 After the Drafting Committee completed
2 its work, the Drafting Committee, under the rules
3 of Conference, was required to present the Act for
4 a reading before the annual meeting of the
5 Conference.

6 And under the rules of the Conference,
7 any uniform act must be presented for at least two
8 readings. And in each reading, each section is
9 actually read aloud in full followed by a debate
10 at the annual meeting regarding each those
11 sessions.

12 The Uniform Environmental Covenants Act
13 was considered in 1992 and in 1993 at the annual
14 Conference and then was approved by a unanimous
15 vote of the states in 1993.

16 Following its approval in 2003 by the
17 vote of the States, the Act was formally endorsed
18 by the House of Delegates of the American Bar
19 Association at its midyear meeting.

20 And then, subsequently, an organization
21 was created by the International City/County
22 Management Association called the National
23 Institutional Controls Coalition to promote and
24 advocate a uniform enactment of the law.

25 The Coalition consists of not only the

1 International City/County Management Association,
2 but also the American Chemistry Council, the
3 American Petroleum Institute, the American Law
4 Institute, and a large number of comparable groups
5 and organizations.

6 The work of the Conference was also
7 financially supported by United States Department
8 of Defense and the EPA, which played a major role
9 in the deliberations of the Conference and the
10 development of this Uniform Act.

11 The principal goals and objectives of
12 this Act, as Representative Rudolph (sic) and
13 Representative Rubley explained, is to encourage
14 and promote the cleanup of contaminated property
15 by allowing what are called activity and use
16 restrictions to be effectively placed on
17 properties following a cleanup.

18 As I'm sure the members of the
19 Committee understand, often, cleanups are based on
20 risk-based assessment that leave some
21 contamination at the site and, therefore, there's
22 a need to restrict the manner in which the land is
23 used and maintained.

24 Most typically, these restrictions will
25 prevent the withdrawal of groundwater or the use

1 of groundwater for drinking water purposes.
2 Oftentimes, they'll also restrict the permissible
3 uses of the land; for example, for residential
4 uses.

5 This Act has two very simple
6 objectives. The first is to make sure that those
7 activity and use restrictions are valid and
8 enforceable.

9 That's a major problem because the law
10 of real estate is very confused in this area.
11 It's uncertain whether these activity and use
12 restrictions are easements, whether they're
13 covenants, whether or not they're another creature
14 called servitude.

15 And it's also very unclear in the
16 common law whether these interests, in fact, run
17 with the land and, in fact, are enforceable in
18 perpetuity.

19 There have been a large number of
20 judicial decisions in which covenants, easements,
21 servitudes which people believed were run with the
22 land and would be permanently enforceable have
23 been found not to be by the courts based on this
24 very complex and historic body of law.

25 One commentator described the body of

1 law this way: She described it as wilderness and
2 a quagmire. And even if you hack your way through
3 it with a machete and you look back to see where
4 your trail was, what you're likely to see was a
5 lot of fowl smelling water and noxious weeds, is
6 her comment.

7 It's just a difficult area of the law.

8 Principally, what this act does is just
9 simply say, We're going to cut through all that
10 and say as a matter of statutory law, these things
11 are enforceable, they are interests that run with
12 the land, they are interests that are enforceable.
13 That's the first objective of the Act.

14 The second objective of the Act is to
15 encourage cleanups by providing a uniform and
16 consistent process and procedure for the
17 development, review, and approval and
18 implementation of environmental covenants.

19 In this respect, the Act will describe
20 what force and effect covenants have, what level
21 of priorities that covenants have versus other
22 interests in real estate.

23 The Act explains who may be -- who may
24 have interest in these covenants and who can
25 enforce the covenants; what the contents of a

1 covenant would be; what the process is for state
2 or federal agencies to review and approve these
3 covenants; where the covenants are
4 recorded -- they're recorded in the land records
5 in the county; but it also provides for the
6 reporting of all covenants in a central registry
7 to be maintained by the Department so they're
8 readily identifiable by all the parties.

9 And, finally, the Act deals with
10 procedures relating to the modification and
11 termination of covenants after they're in effect
12 and procedures for the enforcement of covenants.

13 Now, as Representative Rubley
14 indicated, this Act, like any uniform act, needed
15 to be modified to conform to the unique
16 Pennsylvania legal and administrative
17 requirements.

18 The provisions that were incorporated
19 into this act that are Pennsylvania-unique
20 provisions deal, first of all, with the deemed
21 approval provision.

22 We have in our Land Recycling Act, Act
23 2, a deemed approval for cleanup lands. It seemed
24 appropriate to also have deemed approvals for
25 environmental covenants.

1 There are also provisions added to this
2 Act providing that there may not be a modification
3 or termination judicially of an environmental
4 covenant, either through a proceeding to modify
5 the covenant or through a condemnation, without
6 the approval of the agency that initially approved
7 the covenant, be that either the EPA or DEP or any
8 other agency that might be responsible for the
9 reviewing of enforcement of a covenant.

10 The Act also attempts to deal with the
11 deed notice requirements that currently exist in
12 Pennsylvania law and the Solid Waste Management
13 Act and the Hazardous Waste Cleanup Act.

14 Rather than providing another duplicate
15 set of paper that needs to be recorded in county
16 courthouses, the Act allows the deed notice
17 requirements of those laws to be satisfied by the
18 reporting of environmental covenants.

19 There's a unique provision in the Act
20 recommended by the Department of Environmental
21 Protection that also provides for the conversion
22 of preexisting environmental covenants that were
23 executed prior to the effective date of this act
24 into the new form of environmental covenants
25 authorized under this act.

1 The way the Act was drafted, that was
2 technically unnecessary because the Act validates
3 preexisting environment covenants.

4 But the Department's goal and objective
5 here was to get them all into a uniform form and
6 format, get them all recorded in the same manner,
7 and get them all together in a central registry
8 that the Department maintains.

9 That's an objective that is not
10 inconsistent with the accomplishment and
11 maintenance of uniformity.

12 There are also provisions that were
13 added to the Pennsylvania law based on the Ohio
14 experience adopting Uniform Environmental Covenant
15 Act that deals with the status of purely private
16 environmental covenants that involve no
17 governmental agency.

18 And it clarifies -- nothing in that act
19 is intended to impair or affect one way or another
20 those purely private environment covenants.

21 Finally, provisions are added to the
22 Act providing for the adoption of regulations by
23 the Environmental Quality Board to the extent
24 necessary and recognizing the jurisdiction of the
25 Environmental Hearing Board to resolve disputes

1 and controversies with actions taken by the
2 Department under the Act.

3 One of the strengths of the National
4 Conference is it provides a lot of helpful
5 materials to state legislatures in considering
6 their recommendations.

7 I've assembled those materials for the
8 use of the Committee in my statement today. And
9 what you'll see following my brief introductory
10 comments is really what amounts to a handy toolkit
11 that's prepared by the National Conference to
12 assist legislatures in reviewing uniform acts.

13 The toolkit consists of a couple of
14 components. You get what's called a prefatory
15 note, which is like a bill analysis, but explains
16 in some detail the overall goals and objectives of
17 the Act.

18 And then in addition to the prefatory
19 note, following each individual section of the
20 Act, you'll have uniform official comments which
21 explain how it was drafted and what it's designed
22 to achieve.

23 In my statement today, I've reproduced
24 the prefatory note as drafted by the National
25 Conference together with the comments that follow

1 each section, which are the official comments that
2 accompany the Uniform Act.

3 Finally, I've taken a stab at what I'll
4 call a preliminary version of a Pennsylvania
5 prefatory note and a preliminary version of
6 Pennsylvania comments based on the deliberations
7 that Representative Rubley described.

8 And the Pennsylvania comments attempt
9 to describe how this particular act has been
10 modified to meet the unique Pennsylvania
11 situation.

12 In closing, let me make a couple of
13 general observations about the uniform law
14 drafting process.

15 The first is, there is no such thing as
16 a uniform act that's ever done in the sense of
17 being complete, in the sense of being an act that
18 cannot be substantially improved.

19 No matter how much work goes into these
20 acts, whenever you get a group of intelligent,
21 informed, and engaged people sitting down and
22 reviewing them, you'll always find room for
23 improvement.

24 And that is certainly true when these
25 acts go out into the arena of the states and

1 proceed to enactment.

2 It's somewhat of a misnomer to think of
3 uniform acts as acts that are adopted identically
4 in every state. They're not. Every uniform act
5 is adapted to meet the states in the jurisdictions
6 in which it's enacted.

7 The strength of the process is at the
8 end of the day, what you get, even though you do
9 have changes to fit unique needs -- local needs
10 and circumstances, you have those changes
11 incorporated into a framework that's uniform where
12 people from different parts of the country can
13 readily identify where the changes occur and
14 understand the significance of those changes.

15 So the first general comment I'd make
16 is that we would certainly expect that this
17 Committee and the General Assembly would come to
18 this act and improve the work that's been done by
19 the National Conference.

20 The second comment I'd make, though, is
21 that resources and time are limited. No matter
22 how many times one goes through these acts, you
23 can always find substantial room for improvement.
24 And, at some point in the process, we need to get
25 it done and get it over with on a substantially

1 uniform manner.

2 So I would urge the Committee, in
3 considering modifications to the Act, to always
4 keep an eye on the goal of promoting and enhancing
5 uniformity among the states so we can preserve the
6 important role of the states in real property law
7 and not have this important body of law become
8 subject to the federal --

9 It's my experience that state
10 legislatures, frankly, do a better job than
11 Congress in most of these areas. You get
12 typically a higher quality body of law developed
13 with a lot of interaction between effective
14 stakeholder groups.

15 And once a body of law like this is put
16 into place, it often stays in place in for many
17 years in a stable format.

18 In most states, you have a single
19 subject rule, so you don't have the process you
20 have in Congress of every other session had an
21 omnibus reconciliation act that can change
22 anything unpredictably and you might wind up with
23 a special provision in a environmental covenant
24 designed to build a bridge for \$250 million to
25 some island in Alaska.

1 This process is a worthwhile process.
2 And my advice to the Committee is to approach the
3 Act with an open mind, make improvements as
4 necessary, but keep your eye on the broad goal and
5 objective of achieving uniformity among the
6 states.

7 Thank you very much.

8 CHAIRPERSON ADOLPH: Thank you, Ray.

9 I'd like to acknowledge the presence of
10 Representatives Levdansky and Creighton and also
11 our good Chairman, Representative Camille George.

12 REPRESENTATIVE GEORGE: Good morning.

13 CHAIRPERSON ADOLPH: Good morning.

14 Our next testifier would be -- Eugene
15 DePasquale?

16 MR. DePASQUALE: DePasquale.

17 CHAIRPERSON ADOLPH: DePasquale, okay.

18 Deputy Secretary for Community
19 Revitalization and Local Government Support at
20 DEP.

21 MR. DePASQUALE: My son started
22 kindergarten. In his class, they don't practice
23 spelling cat, they practice our last name and they
24 figure they'll be ready for MIT in no time if they
25 can get that done by the end of the year.

1 Chairman Adolph, Chairman George,
2 members of the Committee, thank you for the
3 opportunity to discuss House Bill 1249. And
4 Chairman George, thank you for sprinting over here
5 and making it.

6 Governor Ed Rendell has put in place
7 the tools we need to improve our economy and our
8 environment, including his work on Growing Greener
9 II and the Advanced Energy Portfolio Standards.
10 That is one of the most progressive portfolio
11 standards in the entire nation.

12 Each of you are to be commended for
13 your efforts in each of those pieces of
14 legislation.

15 A special thank you to Subcommittee
16 Chairperson Rubley. We want to especially thank
17 you for your efforts reaching out, not only to the
18 Department and the Administration, but obviously
19 several groups, some of which are represented here
20 today, in helping draft what we believe is a very
21 good bill.

22 Obviously, it'll be the Committee's
23 work in moving forward; but we think this is an
24 excellent piece of work and we want to commend you
25 for that.

1 One of Governor Rendell's first actions
2 upon taking office was the creation of an office
3 within the Department of Environmental Protection
4 to promote policies and initiatives that foster a
5 climate that establishes a clear understanding
6 where we can grow our economy and clean our
7 environment at the same time.

8 This is the first time a deputy
9 secretary in the Department of Environmental
10 Protection, in Pennsylvania anyway, it focused on
11 jobs and growth; and it is my job to administer
12 that mission.

13 The Pennsylvania Brownfield Program is
14 a key tool for redevelopment and a priority of the
15 Rendell Administration to fulfill its mission of
16 making environment challenges tomorrow's economic
17 opportunities.

18 Prior to my tenure in the Department, I
19 was the Director of Economic Development in the
20 City of York. That combined experience with these
21 two posts provides me the background to discuss
22 this bill before you today.

23 As you likely know, this proposed bill
24 deals with the future use of brownfields. The
25 bill provides clear rules for perpetual real

1 estate interests, what is known as an
2 environmental covenant, to regulate the use of
3 brownfields when real estate is transferred from
4 one owner to another.

5 I want to reenforce that we support the
6 continued use of institutional controls. They are
7 often the tools that make real estate transaction
8 financially viable.

9 The Uniform Environmental Covenants
10 Act, as Representative Rubley said, otherwise
11 known as UECA -- and when there's a bad name for
12 bills or governmental ideas, it's almost always my
13 fault and my wife and kids bail me out. I will
14 accept no blame for the name UECA.

15 But other than the name, it will assist
16 the Department in making sure that institutional
17 controls are protected now and remain protected in
18 perpetuity.

19 A key priority of the Rendell
20 Administration is the revitalization of our
21 cities, boroughs, and towns. UECA will serve the
22 dual purpose of enhancing the protection of human
23 health and the environment while promoting the
24 safe reuse of contaminated brownfield sites that
25 tend to be mostly in cities, boroughs, and towns;

1 but, obviously, we know they can also be in
2 townships as well.

3 UECA fills a critical void in most
4 existing state and regulatory programs, which is
5 why this bill is before you.

6 In 2003, the National Conference of
7 Commissioners on Uniform State Laws, NCCUSL,
8 again, as the Representative said, adopted UECA to
9 provide a framework to implement and enforce
10 future environmental land use restrictions. And
11 this bill is based on that.

12 NCCUSL recommended UECA for adoption by
13 all states. UECA provides the framework for a
14 legal device to restrict activities and impose
15 affirmative obligations on sites where
16 contamination remains in place.

17 An environmental covenant ensures that
18 institutional or engineered controls for residual
19 contamination are reflected in the land records
20 and enforced over time as a valid real property
21 servitude.

22 Brownfields redevelopment in this state
23 has been successful largely because regulators,
24 property owners, and communities have accepted
25 that contamination can be left in place with the

1 proper land use controls to allow redevelopment
2 without presenting any significant risk to human
3 health or the environment.

4 There is a need for better tools to
5 ensure that future generations understand the
6 reasons why land use restrictions have been
7 imposed and why certain long-term maintenance or
8 monitoring -- and/or monitoring might be needed.

9 Regulators and the community need to
10 have confidence that environmental land use
11 restrictions will be enforced in perpetuity.

12 House Bill 1249 states that an
13 environmental covenant must state that the
14 instrument is an environmental covenant containing
15 legally sufficient description of the real
16 property subject to the environmental covenant,
17 describe the activity and the land use limitations
18 of the real property, identify every holder of the
19 property, and be signed with the formalities
20 required for a deed and identify the name and
21 location of any administrative record for the
22 environmental response project reflected in the
23 environmental covenant.

24 Institutional and engineering controls
25 on brownfields remediation under the Act 2 Program

1 that was passed in 1995 are currently recorded in
2 the property deed.

3 DEP does not have any formal legal
4 jurisdiction over deed restrictions. The UECA
5 legislation will give DEP legal authority to, (1),
6 approve the language of the industry restriction
7 and, (2), to enforce the restriction.

8 An example of New Jersey will not be
9 introduced in UECA because their statutes do give
10 the Department of Environmental Quality legal
11 authority, where our authority at DEP is
12 established primarily in guidance and policy
13 rather than law. Obviously, this bill would
14 change that.

15 UECA would strengthen Pennsylvania's
16 ability to ensure that the use of institutional
17 and engineering controls is protective now and
18 that the remedy will remain protective into the
19 future.

20 UECA will be an important tool in
21 revitalizing inner cities and boroughs and towns
22 as well as other areas where vacant and underused
23 property are preventing vital redevelopment or
24 other productive use of land.

25 It was drafted with the participation

1 of state and federal regulators at the national
2 level, public and private land owners at the
3 national level, as well as banking interests,
4 environmentalists, and land use experts.

5 Its enactment here will provide the
6 owners of contaminated land with greater
7 confidence to invest in long-term remediation
8 strategies and use controls, while at the same
9 time protecting human health and allowing those
10 properties to be developed and thus bringing
11 economic revitalization to formerly blighted
12 sites.

13 It is important for you and the public
14 to know that UECA will not impact the cleanup
15 standards. The impact standards of Act 2 are not
16 impacted one iota from this bill.

17 The provisions in House Bill 1249
18 further support DEP's land recycling efforts and
19 requirement to record deed restrictions in the
20 county where the real property is located.

21 Now, obviously, by being located in the
22 county, we will have a central registry in this
23 bill with DEP, but also having the local recording
24 will help public access to those records as well.

25 Regional staff currently review and

1 approve the use of institutional and engineering
2 controls. So that already happens now.

3 The regional office time is not
4 expected to be significantly impacted by the
5 passage of this bill.

6 Other provisions of House Bill 1249
7 include, (1), converting existing engineering and
8 institutional controls; (2), environmental
9 covenants within five years and establishing and
10 maintaining an environmental covenant registry.

11 It is anticipated that additional staff
12 would be required to fulfill these tasks. What we
13 would like we would have is a filling of jobs that
14 are currently on the docket but are not currently
15 filled as opposed to creating -- the need to
16 create new positions.

17 The total number of sites with deed
18 restrictions and engineering controls right now in
19 Pennsylvania is 424. The specific numbers are
20 included in the testimony that you have broken
21 down by region of the state.

22 Given the workload analysis conducted
23 several years by the Department, all but the
24 southwest regional office of the Department should
25 be able to full any additional work in

1 implementation of this bill.

2 The reality is in the southwest region
3 part of the state, even though you have the
4 smallest number of counties, the real estate boon
5 that is going on adds a significant amount of work
6 load. So we do see a future challenge on that
7 side of it in that region.

8 In addition, the majority of the
9 functions will be centralizing and keeping the
10 central registry.

11 There is no denying that to be
12 successful the Brownfield Program requires
13 commitment and a strong team, and you are to be
14 commended for your continued support and
15 improvements of this invaluable program.

16 The potential return on the investment
17 has been demonstrated time and again throughout
18 Pennsylvania with brownfields being converted into
19 new retail, industrial, commercial operations,
20 upscale town houses, baseball fields and more.

21 In fact, in the City of Lancaster, a
22 little league ball field was just cleaned up and
23 converted into Roberto Clemente Park in Lancaster.
24 So we have a public attendance around little
25 league baseball's taking place.

1 Governor Rendell is making sure the
2 tools and policies are in place to strengthen
3 communities across the Commonwealth, and we look
4 forward to working with the General Assembly in
5 any way necessary on passing this bill and working
6 to create an even greater chapter for the
7 Pennsylvania Brownfields Program.

8 I thank you for your time and,
9 obviously, I welcome any questions; but I take it
10 that'll happen at the end.

11 Thank you, Mr. Chairman.

12 CHAIRPERSON ADOLPH: Thank you,
13 Mr. Deputy Secretary. I appreciate it.

14 I'd like to acknowledge the presence of
15 Representative Ron Miller. And for the testifiers
16 and those in the audience, members will be coming
17 and going because of the Committee meetings, not
18 because they're hurrying off.

19 Our next testifier is Miss Pam Witmer.
20 Pam is the President of Pennsylvania Chemical
21 Industries Council. Good morning, Pam.

22 MS. WITMER: Good morning.

23 Good morning, Chairman Adolph, Chairman
24 George, and all the members of the House
25 Environmental Resources and Energy Committee.

1 As the Chairman noted, my name is Pam
2 Witmer, and I'm the President of the Pennsylvania
3 Chemical Industry Council. Joining me today is
4 Terry Bossert, PCIC legal counsel, and an attorney
5 with the law firm of Post and Schell.

6 Terry and I are pleased to have been
7 asked to present the position of PCIC as it
8 relates to House Bill 1249.

9 PCIC represents over 80 companies
10 involved in the business of chemistry in
11 Pennsylvania. The business of chemistry is an
12 important segment of Pennsylvania's manufacturing
13 industry, representing over 8 percent of the
14 state's manufacturing workforce.

15 Chemical production value reaches
16 almost \$30 billion annually. Providing
17 high-paying, family-sustaining jobs is just one
18 element of Pennsylvania's dynamic business of
19 chemistry.

20 While achieving a reduction in core TRI
21 emissions of almost 80 percent since reporting was
22 first initiated, the chemical industry is also a
23 leader in research and development for items that
24 we take for granted on an everyday bases, such as
25 cell phones, paints, protective gear for our

1 police and military, energy saving plastics, and
2 life saving medicines to name just a few.

3 Pennsylvania has been a leader too in
4 terms of its approach to environmental cleanups.
5 The award winning Land Recycling Program, which
6 some of you had a hand in creating, has led to
7 many formerly contaminated sites being put back
8 into productive use.

9 Now that we've had ten years' worth of
10 experience working with the program, however,
11 there is an area of concern as it relates to
12 maintaining any use restrictions placed on the
13 property as a result of a cleanup into perpetuity
14 or for as long as the condition on the property
15 remains constant.

16 Under the current process, whether it
17 be for an act to clean up or a corrective action
18 required under the Storage Tank Act, there is no
19 clean and uniform mechanism to ensure that
20 subsequent property owners are aware of existing
21 restrictions, or that they will follow any
22 restrictions that are a necessary part of an
23 authorized remediation.

24 Representative Rubley, to her credit,
25 has recognized this problem and seeks to address

1 it through House Bill 1249. I would like to thank
2 Representative Rubley for allowing PCIC to
3 participate in the development of House Bill 1249.

4 PCIC supports the bill in concept. We
5 agree that a mechanism and process must be created
6 to allow for the legal use restrictions which have
7 been agreed to by DEP and the property owner as
8 part of a remediation to be continued
9 uninterrupted through subsequent property owners.

10 By requiring that an environmental
11 covenant be created in a standard format,
12 requiring that it be recorded in each county in
13 which the property is located, and requiring that
14 DEP establish a registry of such covenants, a
15 process will be created that ensures that
16 remediation plans which rely on use restrictions
17 will remain protective of the public and the
18 environment.

19 Commercial and industrial property
20 owners will continue to have confidence in the
21 liability protection afforded under programs such
22 as Act 2.

23 There are three areas of the bill that
24 prevents PCIC's complete endorsement. The first
25 is really what I think may be an oversight.

1 Section 6517(b)(1) on page 18 deals
2 with situations where existing instruments must be
3 converted to an environmental covenant as provided
4 for in the bill.

5 Line 10 of page 18 currently reads, If
6 an environmental response projected to be
7 completed prior to the effective date of this
8 section requires establishment of an engineering
9 control or an institutional control, then the
10 engineering control or institutional control,
11 unless waived by the Department, shall be
12 converted to an environmental covenant within 60
13 months of the effective date of this section.

14 As currently written, the subsection
15 seems to apply only to projects in process but not
16 yet completed and not to covenants already
17 completed.

18 PCIC would advocate that what is really
19 meant is environmental response project. So that
20 the section would read, If an environmental
21 response project completed prior to the effective
22 date, and so on.

23 Beyond what we hope is an oversight in
24 section 6517(b)(1), however, PCIC is concerned
25 that the subsection may have been expanded beyond

1 its original intent as seen in earlier drafts of
2 the bill.

3 In earlier drafts, there were separate
4 sections that specifically referred to
5 restrictions imposed under Act 2 and under the
6 Storage Tank Act and which required those to be
7 converted into an environmental covenant.

8 As House Bill 1249 was introduced,
9 section 6517(b)(1) makes no reference to those
10 acts specifically, but rather uses the term
11 "environmental response projected."

12 By definition, this would include
13 remediations completed under federal programs such
14 as SuperFund or RCRA. This would necessitate
15 making changes to covenants associated with
16 projects completed as much as 20 years ago.

17 Finding all these projects and the
18 correct party to convert the covenant will be
19 difficult, if not impossible. Furthermore, such
20 covenants cannot be changed without obtaining
21 permission from USEPA and perhaps dozens of PRPs
22 associated with a particular site.

23 It will be virtually impossible to meet
24 this requirement without resorting to litigation.
25 There seems to be no reason to go back and search

1 out the old federally regulated sites when the Act
2 specifically preserves the validity of any
3 covenants and restrictions established before this
4 act.

5 PCIC would advocate limiting the
6 Conversions to Environmental Covenants section to
7 restrictions used as part of an Act 2 or a storage
8 tank remediation.

9 The last area of concern with House
10 Bill 1249 rests not with the real intent of the
11 bill, which is to provide a legally-enforceable
12 mechanism to ensure that completed remediation
13 projects remain intact, but with what PCIC views
14 as an overly-broad delegation of authority to
15 DEP.

16 We are of the belief that House Bill
17 1249 is, for the most part, a well-crafted bill.
18 Representative Rubley has done a outstanding job
19 in laying out the reasons why such a law is
20 necessary and has provided a very detailed process
21 on how the program should be implemented.

22 Section 6515 on page 17 of the bill
23 provides carte blanch authority to DEP to develop
24 an undefined regulatory scheme to manage
25 environmental covenants.

1 We believe that the bill gives DEP and
2 the public a clear set of procedures and
3 requirements. There does not seem to be a need to
4 have DEP reinvent the wheel with regulations. We
5 do not believe that it's necessary to provide the
6 Department with such wide-ranging rule making
7 powers.

8 Please do not misunderstand what I am
9 trying to say. PCIC does agree that there are
10 areas in which some regulatory clarification could
11 be necessary, but the language provided in section
12 6515 goes far beyond what is needed.

13 We offer instead the following language
14 which could be used in place of the existing
15 section 6515.

16 The new suggested regulatory language
17 would read as I've laid it out there for you, and
18 you can certainly read that at your leisure.

19 The members of the Pennsylvania
20 Chemical Industry Council thank Representative
21 Rubley for the opportunity to participate in the
22 development of this important piece of legislation
23 that will help ensure that remediation projects
24 which entail some sort of engineering control or
25 land use restriction will remain intact in years

1 to come to protect the public and the environment.

2 With the few changes suggested above,
3 PCIC will be able to provide full support to House
4 Bill 1249.

5 CHAIRPERSON ADOLPH: Thank you, Pam.

6 Our final presenter for this morning is
7 Mr. Brian Hill. Brian is the Executive
8 Vice-president of the Pennsylvania Environmental
9 Council.

10 Good morning, Brian.

11 MR. HILL: Good morning.

12 Chairman Adolph, Chairman George, and
13 members of the Committee, thank you for inviting
14 me here today to testify on behalf of the
15 Pennsylvania Environmental Council.

16 My name is Brian Hill, and I'm the
17 Executive Vice-president for the Council working
18 here in Harrisburg.

19 The Council is a statewide nonprofit
20 group that was created 35 years ago with
21 conservation group, business, local government and
22 citizen members. We appreciate the opportunity to
23 share our views on House Bill 1249, the Uniform
24 Environmental Covenants Act.

25 The Council's involved in a wide

1 variety of issues ranging from water quality and
2 abandoned mine lands to community revitalization
3 and land use; but, historically, we've really
4 focused a lot of our energies on land use and the
5 legacy of past waste disposal practices.

6 In the 1990's, the Council grew
7 concerned about the number of abandoned former
8 industrial sites, brownfields, throughout the
9 state that sat dormant while nearby greenfield
10 sites were developed.

11 Brownfield reuse sat at the
12 intersection of two of our organization's major
13 priorities: The development of a real estate
14 cleanup standard for remediation sites with
15 contaminated soil and groundwater that posed a
16 threat to human health and environment, and our
17 interest in seeing the State adopt policies that
18 would encourage the use of existing sites instead
19 of developing greenfields.

20 We conducted a series of roundtable
21 discussions to flush out those issues associated
22 with brownfield reuse and we shared the report
23 with the General Assembly as it was grappling with
24 the three pieces of legislations that led to the
25 Land Recycling Program here in Pennsylvania.

1 During those discussions, the Council
2 drew attention to two major issues: That we had a
3 need for a clear public participation program and
4 that the final programs, whatever was adopted,
5 must protect public health and the environment.

6 We have an ongoing interest in this
7 issue as well because, throughout the state, our
8 regional offices are still involved in issues
9 related to the reuse of industrial sites.

10 In western Pennsylvania, for example,
11 we worked successfully with a coalition of
12 schools, the local government, an economic
13 development agency, and a college to create the
14 French Creek Outdoor Learning Center, which is
15 located on a former brownfield site near
16 Meadville, Pennsylvania.

17 Over 4,000 students visit the site each
18 year, and the industrial history of the site and
19 past environmental practices are part of the
20 curriculum.

21 In northeastern Pennsylvania, we are
22 working with DEP, local governments, and economic
23 development agencies to identify brownfields and
24 garyfields -- abandoned mine land sites -- that
25 can be included on the state inventory and reused.

1 And, finally, in southeastern
2 Pennsylvania, our regional office is a key player
3 in efforts to revitalize the Delaware Riverfront.
4 We're working with key stakeholders to develop an
5 implementation strategy for green infrastructure
6 envisioned for a eight-plus mile riverfront
7 redevelopment project on the Delaware north of
8 Center City Philadelphia.

9 And throughout the state, we work to
10 ensure that the public understands the advantages
11 and limitations associated with certain land use
12 choices and that, once decisions are made,
13 information about those decisions runs with the
14 land so future activities do not undermine
15 environmental safeguards.

16 Because of our ongoing interest in
17 these issues, we support the adoption of House
18 Bill 1249. We thank the sponsor and the
19 cosponsors for their willingness to tackle this
20 issue.

21 Though it may be perceived as arcane by
22 some, or by many, it is nevertheless -- it
23 provides for an important improvement to
24 Pennsylvania's program.

25 The purpose of the Act has been

1 explained very well by others, so I won't go into
2 these details again. But we support this for the
3 following reasons.

4 One, it will provide clarity and
5 certainty about long-term obligations. And this
6 is in the interest of the public and the
7 environment.

8 Secondly, House Bill 1249 is a logical
9 extension of the three-bill package enacted in
10 1995 that established the framework for
11 Pennsylvania's Brownfield Reuse Program.

12 Since 1995, DEP and the Environmental
13 Quality Board have worked to develop a consistent
14 and clear set of rules for the Brownfield Program,
15 and House Bill 1249 represents a continuation of
16 those efforts.

17 It also dovetails well with the state's
18 current initiatives to encourage brownfield
19 remediation through the assistance of the
20 brownfield action teams at DEP and its focus on
21 revitalizing communities for the community action
22 teams at DCED.

23 House Bill 1249 will help ensure that
24 any remediation undertaken in conjunction with the
25 work of these teams is well-documented and that

1 obligations will be met in the future.

2 Finally, in 2001, the General Assembly
3 saw the wisdom of taking similar action by
4 adopting the Conservation and Preservation
5 Easement Act, which was based on the national
6 Uniform Conservation Easement Act model.

7 That statute clarified issues relating
8 to how conservation easements would be dealt with
9 in the Commonwealth. House Bill 1249 would
10 provide similar clarity on former industrial sites
11 that have been remediated.

12 In conclusion, we urge you to support
13 the adoption of the Uniform Environmental
14 Covenants Act here in Pennsylvania. The Council
15 believes that passage of the legislation is in the
16 best interest of the Commonwealth citizens and
17 environment.

18 And I too thank you for inviting us to
19 testify today and am available to answer
20 questions.

21 CHAIRPERSON ADOLPH: Thank you, Brian.
22 And I want to thank all the testifiers for their
23 presentation and the preparation for the meeting.

24 We do have a couple questions for you.
25 And a couple of the members have meetings that

1 they have to get to at 10:00, so I'm going to
2 start off with Representative Chris Ross.

3 REPRESENTATIVE ROSS: Thank you,
4 Mr. Chairman.

5 And I'd like to direct my question to
6 the right-hand side of the table here to Mr. Pepe,
7 Mr. DePasquale, and Mr. Hill.

8 The Chemical Industry Council raised a
9 couple of issues that require some -- potentially
10 require some modification to the language.

11 One, focusing the remediation on a
12 couple of specific areas and I guess avoiding some
13 of the federally-mandated cleanups previously and
14 then also, again, focusing the degree of
15 regulatory opportunities for the Department to
16 focus in on the fee area.

17 And I was wondering if each of you in
18 turn could perhaps share whether you have any
19 problems with that or whether those would be
20 modifications that you could support?

21 MR. PEPE: Let me begin. From the
22 perspective of the National Conference, these are
23 not issues that affect uniformity, regardless of
24 how they're resolved. These are policy decisions
25 that are best made at this level.

1 On the merits, with respect to the
2 conversion of preexisting covenants, the Act was
3 drafted so as not to necessitate the conversion of
4 preexisting covenants, because it's drafted to
5 validate preexisting covenants.

6 On the other hand, we certainly
7 understand that having a central registry where
8 all of this information is available in a single
9 and uniform format does have some substantial
10 value.

11 One refinement that we did make in the
12 drafting process to try to bring the parties
13 closer together was to clarify that, regardless of
14 whether or not a preexisting covenant is
15 converted, does not affect its validity. It will
16 remain in force and effect regardless if it's
17 converted.

18 And the Department, of course, has the
19 power to waive the conservation requirement. So
20 if the Department can't get everybody's consent to
21 a conversion, the Department could waive that
22 consent in the interest of getting everything into
23 a single common database.

24 But, again, this is an area that does
25 not affect uniformity and it's a policy decision

1 to be made by the Committee.

2 MR. DePASQUALE: Yes. We would support
3 it. We feel strongly that it should be as is.
4 Having said that, without it, you would still have
5 protections for public health; so you don't lose
6 any of those protections.

7 So we're willing to engage in that
8 discussion if it would lead to some other
9 discussions that may create a better bill at the
10 end. But as is, we do support that language being
11 that way, just for uniformity's sake.

12 REPRESENTATIVE ROSS: And on the other
13 question of the extension of regulations or
14 narrowing them?

15 MR. DePASQUALE: We will defer to the
16 Committee on how much latitude we are to have as
17 we move forward.

18 REPRESENTATIVE ROSS: Thank you.

19 CHAIRPERSON ADOLPH: Thank you.

20 Representative Kate Harper.

21 REPRESENTATIVE HARPER: Thank you.

22 Also a question for the lawyers,
23 unfortunately.

24 I'm a co-sponsor of the bill, and I do
25 believe strongly in the need for this legislation.

1 Here's my question:

2 The bill breaks down the information
3 that must be in the covenant and the information
4 that may be in the covenant, then provides much
5 later in the Act for a short form that can be
6 filed instead.

7 My concern is that in the "may be
8 included" category is the description of the
9 contamination and remedy and the restriction or
10 limitation on amendment and termination. And when
11 you go back to the short form, of course, those
12 things are not in the required short form.

13 Here's what I'm worried about: I come
14 from southeastern Pennsylvania where we've done a
15 lot of these projects. And in the beginning we
16 were swapping industrial site for industrial site
17 and it was necessary to give comfort to fairly
18 sophisticated buyers, quite frankly, about the
19 nature of contamination; but they had
20 environmental lawyers anyway.

21 What we're now doing in Montgomery
22 County is converting brownfield sites to
23 condominiums and homes, and I think that's a great
24 thing. But what I'm worried about is a consumer
25 getting the title report that has the brief

1 description will know that the site was a former
2 brownfield site, have no idea what type of
3 contamination was there, and will have no idea or
4 comfort from the fact that it can't be amended or
5 it's perpetual or not.

6 So I guess I'm directing this question
7 to the lawyerly group to say why isn't that a
8 "must be required" and why isn't it in the short
9 form? Because when you get consumers who are
10 unsophisticated buyers generally, that's
11 information I think is something they'd want to
12 know.

13 MR. DePASQUALE: The one thing I would
14 say to that is that there's one area where there
15 absolutely needs to be the most protection
16 possible; and that is on the residential side of
17 things.

18 And if this Committee feels that this
19 language doesn't get there, I mean, then that's
20 something that I think you should take a look at.
21 You know, we have -- again, I don't want to do
22 anything other than -- you know, we've worked
23 together to get this bill together as is.

24 But if you don't believe that is a
25 strong enough protection, then that's something

1 we're certainly willing to discuss with you on how
2 to get there. Because residential is the side on
3 the cleanup side of that too where you do have the
4 strongest standards in place.

5 So, we'd be willing to --

6 REPRESENTATIVE HARPER: I'm sure if the
7 consumer knew what that was all about they'd be
8 okay. What I'm worried about is raising fears
9 that's not answered by the document.

10 MR. DePASQUALE: That's a good point.

11 MS. WITMER: Representative Harper --

12 CHAIRPERSON ADOLPH: Yes, Pam.

13 REPRESENTATIVE HARPER: Got another
14 answer.

15 MR. PEPE: If I could expand on the
16 answer, the Act requires the full covenant itself
17 to be reported both in the county land records and
18 in the central registry.

19 And in addition to reporting the full
20 covenant, it also requires the -- it allows the
21 reporting of the short form as an additional
22 notice. So the public, in fact, gets to see more
23 than just the short form. The short form is
24 designed as an easy way to provide information.

25 The covenant must also in all

1 circumstances advise people where the full
2 administrative record is with respect to the Act 2
3 cleanup so they can see all of the details.

4 Now, one of the intentions in drafting
5 this act was we wanted to appreciate that one size
6 doesn't fit all and we wanted to make sure that
7 these covenants were legally effective.

8 And to the extent that there's a very
9 long list of mandatory requirements for
10 permissible covenant, then these are all, you
11 know, legal traps that if you don't step through
12 one of the hoops quite the right way, the validity
13 of the covenant might be impaired.

14 So what the Drafting Committee tried to
15 do was to focus on the core components that must
16 be in every covenant for legal validity and then
17 to allow additional information to be placed in
18 the covenants.

19 Now, here's where you kick back to this
20 whole question of the regulatory authority of the
21 Department. One size doesn't fit all. And the
22 Department gets to review and approve every
23 covenant.

24 So it may be valuable for the
25 Department to, in its regulations, articulate in

1 what types of covenants it's going to require
2 additional information beyond the core components
3 and when it doesn't.

4 So I think your comment is a good one
5 and the Act is drafted to attempt to accommodate
6 it, while nonetheless imposing as few impediments
7 as possible to the validity and enforceability of
8 these covenants.

9 What you don't want to do is wake up at
10 the end of the day and have somebody challenging a
11 covenant because you didn't dot an "I," cross a
12 "T," or include some information in the document.

13 The goal was to make it simple and then
14 to allow the Department as a condition of its
15 approval to require more, as appropriate.

16 CHAIRPERSON ADOLPH: Thank you.

17 Any other questions, Representative?

18 REPRESENTATIVE HARPER: No. I would
19 just say I still believe that a brief description
20 of the contamination and the cleanup belongs in
21 the "must" column.

22 CHAIRPERSON ADOLPH: Okay.

23 REPRESENTATIVE HARPER: Thank you.

24 CHAIRPERSON ADOLPH: Representative
25 Dick Stevenson.

1 REPRESENTATIVE STEVENSON: Thank you,
2 Mr. Chairman.

3 I'd like to follow up briefly on
4 questions raised by Representative Ross a few
5 moments ago relative to the Chemical Industry
6 Council's two main concerns here.

7 And I'd like to preface it by saying
8 it's my understanding that much of the focus of
9 this legislation is to encourage development of
10 brownfield sites and to give some level of comfort
11 to developers who move in there.

12 And I might ask Miss Witmer, who didn't
13 get a chance to respond when Mr. Ross spoke, if
14 those two concerns address that issue with the
15 likelihood of perhaps USEPA or RCRA being typical
16 concerns being brought into this, would that have
17 a limiting effect on the development of those
18 properties by potential developers in that it
19 would tie up the process for a much longer extent?

20 And, further, if you'd like to add any
21 other comments relative to the question from
22 Representative Ross...

23 MS. WITMER: Sure. No, that is
24 absolutely what we think would happen is that the
25 need to go back to some of these very old

1 SuperFund or RCRA remediations.

2 Trying to find all of the responsible
3 parties to that remediation could be very
4 difficult, that you would then have to resort to
5 potentially some litigation, which is counter to
6 what we're trying to achieve here, which is a, you
7 know, streamlined, more efficient process that is
8 protective of the environment going forward and
9 also providing some comfort to the individuals who
10 are participating in the remediation.

11 And especially since the Act already
12 gives -- it maintains the validity of
13 those -- we're not doing anything to change that.

14 REPRESENTATIVE STEVENSON: All right.
15 Thank you very much. Thank you, Mr. Chairman.

16 CHAIRPERSON ADOLPH: Thank you.
17 Representative Mike McGee.

18 REPRESENTATIVE MCGEE: Thank you,
19 Mr. Chairman. I want to join you in commending
20 Representative Rubley for getting her hands around
21 what is a bear of a problem around the state.

22 And certainly I have some intimate
23 knowledge of that, coming from the City of
24 Philadelphia. And so do you, Mr. Chairman, from
25 Delaware County with the former industrial sites

1 that hopefully are in the process of being
2 remediated and then put to good economic use.

3 I do have some real concerns with
4 expanding DEP's authority over these covenants in
5 the state. And I say that with some frustration
6 with the Department in -- with the lack of
7 expanding our role as legislators when we talk
8 about expanding DEP's authority.

9 Certainly I'm sure the members here
10 have -- feel sometimes out of the loop. I don't
11 know where all the brownfields are in my district.
12 I don't know what my role is as a legislator in
13 trying to steer the Department to remediate those
14 sites and, um, again, make the process smoother
15 and much more effective.

16 I guess my question is to
17 Mr. DePasquale. I appreciate you being here and
18 for your testimony. But I would like to see
19 language put into the bill -- if we're going to
20 expand the Department's authority, I'd like to see
21 our roles as representatives and senators also
22 expanded to include language in this bill that
23 would provide for advice and consent of both
24 representatives and senators in this process to
25 marry what is your expanded role and, in turn,

1 expand our role as well.

2 I know I spoke briefly with Chairman
3 George yesterday on the House Bill about doing
4 that, not on this bill, but in every other bill
5 that deals with the Department of Environmental
6 Protection.

7 MR. DePASQUALE: Thank you,
8 Representative. The only response I would have is
9 if that were to pass, that would give us the
10 leverage to ensure that that happens on
11 development as well and would give us the ability
12 to do that. So the short answer is, If that would
13 be in this legislation, we would obviously enforce
14 it.

15 MR. PEPE: I'm --

16 REPRESENTATIVE MCGEE: I'm glad to see
17 the development -- if I may, Mr. Chairman?

18 CHAIRPERSON ADOLPH: Yeah.

19 REPRESENTATIVE MCGEE: From the
20 Pennsylvania Environmental Council, I saw the
21 great things that you talked about in the York
22 Delaware Riverfront and I'm certainly aware of
23 that since most of that is in my district.

24 But I have not had an opportunity to
25 meet with your -- that's probably part of

1 frustration.

2 So, Mr. Chairman, I would ask to work
3 along with you through Chairman George to include
4 expanding our role in this process while we look
5 at expanding DEP's role as well.

6 CHAIRPERSON ADOLPH: Very good. Thank
7 you.

8 Representative Dan Surra.

9 REPRESENTATIVE SURRA: Thank you,
10 Mr. Chairman. I'd like to thank the panel for
11 their testimony.

12 Would the formation of the covenants
13 deal with a situation that I find in my
14 legislative district quite often where there's
15 been agreements on consent decrees, long-term
16 treatment of mine acid discharge, for example, or
17 pump and treat of a former industrial site to try
18 to clean up the groundwater and then, years down
19 the road, the responsible individual or company
20 files bankruptcy?

21 Would this deal -- would this covenant
22 cover those consent decrees over the long-term and
23 how would it deal with someone that makes a
24 covenant and then subsequently files bankruptcy?

25 MR. DePASQUALE: I mean, my belief is

1 that it would, that it would cover those as well.

2 But, Ray, do you want to speak on the
3 legal side of it?

4 MR. PEPE: One of the factors that led
5 the National Conference to take on this project
6 was a 5th Circuit Court decision down in 2002
7 invalidating an environmental covenant in a
8 bankruptcy proceeding.

9 So this legislation is designed to make
10 it very clear that these covenants run with the
11 land and are intended to be enforceable in the
12 long run and are free from all of the uncertainty
13 created by the complex body of real estate law
14 dealing with servitudes and covenants and
15 easements.

16 The other thing that this legislation
17 does is to provide that every covenant is to have
18 a holder. And the holder can be the Department.
19 But the holder can just as equally be a local
20 government, the holder can be a nonprofit land
21 conservancy, can be an organization like,
22 conceivably, the PEC; and then the holder would
23 actually have an interest in the real estate.

24 And in addition to the rights that
25 would be possessed by the Department, you know, as

1 a holder, that party, you know, could also assume
2 responsibility in ensuring long-term enforcement
3 of these covenants.

4 Beyond that, the Act also makes it very
5 clear that every party to the covenant has rights
6 to enforce the covenant, real estate rights to
7 enforce the covenant in addition to whatever, you
8 know, administrative powers the Department may
9 have to issue orders and whatever other remedies
10 are available under citizen suits.

11 REPRESENTATIVE SURRA: I'm glad to hear
12 that. Was that -- that bankruptcy that you're
13 speaking of, did that deal with Pennsylvania?

14 MR. PEPE: No. This was in Texas, just
15 a large number of cases in which covenants have
16 been found to put in property interests that
17 didn't run with the land. And this legislation is
18 designed to eliminate that problem.

19 REPRESENTATIVE SURRA: What about in
20 situations where the person is responsible for the
21 consent decree, own the mineral rights, but the
22 property is owned by another interest?

23 MR. PEPE: The legislation provides
24 that anybody who has an interest in the land, any
25 interest in the land, is an appropriate party to

1 enforce the covenant.

2 REPRESENTATIVE SURRA: Thank you.

3 CHAIRPERSON ADOLPH: Question? Yes,
4 Pam.

5 MS. WITMER: Representative Surra, I'd
6 just like to point out, however, that I don't
7 think it necessarily gets to the mining statute.
8 We're more talking about cleanups under an Act 2
9 or hazardous site cleanup type of a situation.

10 REPRESENTATIVE SURRA: Don't you think
11 they should?

12 MS. WITMER: If the Legislature would
13 like to expand that, that is something to
14 consider.

15 REPRESENTATIVE SURRA: Does anybody on
16 the panel -- because when you're talking
17 about -- this is a sticky issue, these long-term
18 agreements and commitments to an environmental
19 problem.

20 And when the agency -- not an -- agency
21 I guess is the wrong term -- an interest can just
22 file for bankruptcy and then kind of back out of
23 'em and then it ends up in the laps of the
24 taxpayer on one of the interested groups, that's
25 not my idea of how we should do things.

1 But I would be interested in the
2 Department or anybody's feelings on if they think
3 that we should maybe bring in the mining into the
4 arena.

5 MR. DePASQUALE: If you don't mind,
6 Representative, I would go back to talk to our
7 mining folks just to make sure that they would be
8 fine with that and submit a formal answer in
9 response to that.

10 MR. PEPE: If I could, the term
11 environmental response project is broad and it
12 refers to any plan or work performed for
13 remediation of relevant property.

14 But the Act could be triggered only
15 when the Department requires as part of an
16 environmental response the creation of a covenant
17 which is a servitude in land.

18 And it could apply in circumstances
19 other than -- and Act 2, but only if the
20 Department affirmatively determines that as part
21 of the response action taken pursuant to some
22 statute to remediate contaminated real property,
23 that it's necessary to create a covenant.

24 If the Department pros feels it's
25 necessary to provide a covenant, this provides us

1 a road map to do it in other state law and not
2 dealt with within this act.

3 MR. DePASQUALE: The only thing I would
4 add to that, Representative, you're on a point
5 where the Act 2 tends to deal with what is put
6 into the ground; whereas, you know, with mining,
7 it tends to be what gets pulled out of the ground.

8 So they are one level, two different
9 areas. And sometimes it isn't more of cleanup;
10 it's more what happens to the water downstream
11 with the water table, what have you.

12 So I think it's something we should
13 think about from a policy standpoint and give you
14 a formal response.

15 CHAIRPERSON ADOLPH: Thank you.
16 Representative Rubley.

17 REPRESENTATIVE RUBLEY: Thank you,
18 Mr. Chairman, and thanks to all the panelists for
19 your excellent presentations this morning.

20 Just one comment. One other objective
21 with pursuing this legislation is not just to
22 ensure that our existing sites are truly covered
23 by the covenants and enforceable, but also to
24 encourage businesses who are currently sitting on
25 brownfields and are reluctant to become engaged in

1 the process because they fear that the liability
2 will come back to haunt them down the road.

3 So we have a lot of other sites out
4 there that could become part of cleanup operations
5 and put to new uses if we have the proper
6 covenants in place.

7 My question, though, goes to the point
8 raised by the Chemical Industry on expanding the
9 registry to include the SuperFund and the RCRA
10 sites. And this is an issue that's coming to us
11 later in the game.

12 And I know DEP would very much like to
13 have a broad-based central registry, but I don't
14 think we ever envisioned that it would mean going
15 back and correcting existing covenants under
16 SuperFund and RCRA. And that would be a huge,
17 huge issue.

18 I mean, how do you envision covering
19 those if, in fact, that is what comes about?

20 MR. DePASQUALE: It's certainly a fair
21 point that it would be time consuming and on the
22 factual side of the Chemistry Industry Council's
23 side of length and potential litigation. We don't
24 dispute any of that.

25 So, I mean, we support it for the idea

1 of uniformity. But having said that, without it,
2 we still have the same legal mechanisms to protect
3 public health.

4 So the question's whether we want to
5 potentially have, you know, prior SuperFund sites
6 that just aren't in the system.

7 REPRESENTATIVE RUBLEY: All right.
8 Well, I think we'll have to get some of our group
9 together and hash that issue out.

10 MR. DePASQUALE: Yeah.

11 REPRESENTATIVE RUBLEY: I see really
12 expandable problems on the part of businesses
13 trying to do this and locating -- PRPs might not
14 even be around.

15 Thank you again for all of your
16 testimony today.

17 CHAIRPERSON ADOLPH: Thank you.

18 Representative Brian Miller has the
19 final question of the morning.

20 REPRESENTATIVE MILLER: Thank you,
21 Mr. Chairman.

22 Just a reenforcement of what
23 Representative Rubley just said and Representative
24 Stevenson alluded to earlier. Going back and
25 trying to do or rework the covenants in a

1 different format, the preexisting -- an
2 interesting personal experience when I was in
3 private industry.

4 The Chemical Industry Association
5 testified there could be dozens of PRPs. Well,
6 there is a site about five miles south of here
7 that had 1100 PRPs. And the 1100 PRPs would be
8 just impossible to even begin to track down.

9 Now, we have all kinds of legal
10 documents for the diminimus contributors and
11 everything else; but I just think it's a nightmare
12 that we have to be very careful how we address.

13 This is a very good concept. It's
14 great what we're trying to do here. We just have
15 to be careful with that.

16 MR. DePASQUALE: Fine.

17 REPRESENTATIVE MILLER: Thank you,
18 Mr. Chairman.

19 CHAIRPERSON ADOLPH: Thank you.

20 I want to thank the panel for your
21 information today on a very complex subject
22 matter, and I want to thank the members of the
23 Committee for their participation. This meeting
24 is now adjourned. Thank you.

25 (Proceedings adjourned at 10:17 a.m.)

1 I HEREBY CERTIFY that I was present
2 upon the hearing of the above-entitled matter and
3 there reported stenographically the proceedings
4 had and the testimony produced; and I further
5 certify that the foregoing is a true and correct
6 transcript of my said stenographic notes.

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Deirdre J. Weyer, RPR
Notary Public